

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
Plaintiff,

v.

RHONDA FIRESTACK-HARVEY, LARRY  
HARVEY, MICHELLE GREGG, ROLLAND  
GREGG, and JASON ZUCKER,  
Defendants.

No. CR-13-24-FVS

ORDER DENYING MICHELLE  
GREGG'S MOTION TO DISMISS  
(**ECF 383**) AND HER MOTION  
FOR RECONSIDERATION (**ECF**  
**384**)

**THIS MATTER** came before the Court by telephone conference call on June 23, 2014, based upon Michelle L. Gregg's motion to dismiss Counts 1, 2, and 4 of the Superseding Indictment and her motion for reconsideration of prior orders excluding evidence of the defendants' alleged compliance with the State of Washington's Medical Use of Cannabis Act. The parties were represented by their respective attorneys.

**MOTION TO DISMISS**

A. Background

Larry Harvey and Rhonda Firestack-Harvey reside in a sparsely populated area that is located nine or ten miles outside of Colville, Washington. On August 9 and 16, 2012, law enforcement officers searched their residence and the property that surrounds it. The United States alleges 74 marijuana plants were growing on their

1 property on August 9th. On that date, state law enforcement officers  
2 seized some, but not all, of the plants. They also seized a number of  
3 firearms that allegedly were located in the Harveys' residence. The  
4 second search occurred on August 16th. Federal agents seized all of  
5 the remaining marijuana plants. In addition, they seized a computer.  
6 The United States alleges the computer has been examined by a computer  
7 expert. According to the United States, the computer contains  
8 photographs that are electronically "stamped" with the date 2011. The  
9 photographs allegedly show 70 or more marijuana plants growing near  
10 the Harveys' residence.

11 Ms. Gregg and four other persons have been indicted. The  
12 Superseding Indictment contains five counts. Ms. Gregg moves to  
13 dismiss Counts 1, 2, and 4. Count 1 alleges she and her four co-  
14 defendants conspired to manufacture and distribute marijuana. The  
15 conspiracy allegedly began on or about June 1, 2011, and continued  
16 until August 16, 2012. Count 2 alleges Ms. Gregg manufactured  
17 marijuana during 2011 and 2012. Count 4 alleges she knowingly  
18 possessed a number of firearms in furtherance of Counts 1 and 2.

19 At trial, the United States will attempt to prove Ms. Gregg and  
20 her co-defendants participated in a single conspiracy that spanned two  
21 years. The United States will attempt to prove the conspirators  
22 manufactured 70 or more marijuana plants during 2011 and 74 marijuana  
23 plants during 2012. Ms. Gregg vehemently denies she participated in a  
24 single conspiracy. At most, in her opinion, the evidence suggests the  
25 existence of two separate conspiracies, each of which involved fewer  
26

1 than 100 marijuana plants. Nor, according to Ms. Gregg, does the  
2 evidence connect her to the firearms. She insists they belonged to  
3 the Harveys, and she had nothing to do with them. Given the problems  
4 she sees in the plaintiff's case, she urges the Court to dismiss  
5 Counts 1, 2, and 4.

6 B. Standard

7 Ms. Gregg is seeking relief pursuant to Federal Rule of Criminal  
8 procedure 12(b)(2). Paragraph (b)(2) states, "A party may raise by  
9 pretrial motion any defense, objection, or request that the court can  
10 determine without a trial of the general issue." However, neither  
11 Rule 12(b)(2) nor any other Federal Rule of Criminal Procedure  
12 authorizes a motion for summary judgment in a criminal case. *United*  
13 *States v. Jensen*, 93 F.3d 667, 669 (9th Cir.1996) (citing *United*  
14 *States v. Critzer*, 951 F.2d 306, 307 (11th Cir.1992) (per curiam)).  
15 Thus, when a defendant moves to dismiss based upon the government's  
16 alleged inability to prove an element of the charge, a district court  
17 must determine whether the issue raised by the defendant's motion is  
18 "entirely segregable from the evidence to be presented at trial."  
19 *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th  
20 Cir.), (internal punctuation and citations omitted), *cert. denied*, 478  
21 U.S. 1007, 106 S.Ct. 3301, 92 L.Ed.2d 715 (1986). If resolution of  
22 the motion "is substantially founded upon and intertwined with  
23 evidence concerning the alleged offense, the motion falls within the  
24 province of the ultimate finder of fact and must be deferred." *Id.*  
25 (internal quotation and citations omitted).  
26

1        C. Ruling

2        The parties devote many pages of their memoranda to a discussion  
3 of 21 U.S.C. § 846; specifically, whether the evidence establishes the  
4 existence of a single conspiracy that spanned 2011 and 2012. While  
5 the parties' have engaged in a thoughtful discussion of conspiracy  
6 law, and while their discussion will be helpful if and when Ms. Gregg  
7 moves to dismiss pursuant to Rule 29(a), the fact remains the Court  
8 cannot grant the relief she is requesting without evaluating evidence.  
9 This is true of her argument the evidence does not prove a single  
10 conspiracy, and it is true of her argument the evidence does not  
11 connect her to the firearms that allegedly were discovered in the  
12 Harveys' residence. Since Ms. Gregg's motion to dismiss "is  
13 substantially founded upon and intertwined with evidence concerning  
14 the alleged offense[s]," *Shortt Accountancy Corp.*, 785 F.2d at 1452,  
15 it must be deferred until the United States presents its case in chief  
16 at her trial. See *id.*

17        **MEDICAL USE OF CANNABIS ACT**

18        A. Background

19        Ms. Gregg alleges the outdoor growing season in northeast  
20 Washington is limited. One cannot grow marijuana out of doors year  
21 around. Rather, each year, a grower must begin a new crop. Given the  
22 cyclical nature of growing marijuana outdoors, says Ms. Gregg, a  
23 grower must make a conscious decision each year to plant a crop. If  
24 multiple persons are involved, they must agree each year to grow  
25 marijuana, and then they must take the steps that are necessary to do  
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1 so. Ms. Gregg argues the State of Washington's regulatory scheme  
2 recognizes the cyclical nature of marijuana growing. Each year,  
3 according to her, a would-be grower must apply for a permit under the  
4 Medical Use of Cannabis Act ("MUCA"), chapter RCW 69.51A. In her  
5 opinion, evidence of the annual-renewal requirement would tend to  
6 support her theory that there were, at most, two separate agreements  
7 to grow marijuana; one agreement in 2011 and another one in 2012.

8 Ms. Gregg's codefendants have joined her motion and expanded her  
9 original argument. They maintain the Court erred by ruling they may  
10 not present evidence concerning their alleged compliance with the  
11 MUCA. They submit such evidence is indispensable to rebut the United  
12 States' allegation that they both conspired to distribute marijuana  
13 and did, in fact, distribute marijuana. According to the defendants,  
14 MUCA-compliance evidence will show they intended to use all of the  
15 marijuana they manufactured for the sole purpose of addressing their  
16 medical needs. Finally, Larry Harvey argues the Court erred by  
17 denying his motion to suppress evidence concerning firearms that law  
18 enforcement officers allegedly discovered in his residence.

19  
20 B. Ruling

21 *1. No basis for reconsidering motion to suppress*

22 On August 9, 2012, law enforcement officers searched Larry  
23 Harvey's and Rhonda Firestack-Harvey's residence pursuant to a search  
24 warrant. The warrant did not authorize the officers to seize  
25 firearms. Nevertheless, when the officers observed firearms during  
26 the course of the search, the officers seized them. Larry Harvey

1 moved to suppress. The Court denied the motion because the firearms  
2 properly were seized in accordance with the "plain view" doctrine.  
3 *See Horton v. California*, 496 U.S. 128, 136-37, 110 S.Ct. 2301, 2308,  
4 110 L.Ed.2d 112 (1990). One of the key components of the ruling was  
5 the Court's determination the incriminating character of the firearms  
6 was immediately apparent to the officers. In Mr. Harvey's opinion,  
7 this determination was erroneous. He maintains the Court attached too  
8 much weight to the officers' training and experience. *Cf. United*  
9 *States v. Rios*, 449 F.3d 1009, 1015 (9th Cir.2006) ("expert testimony  
10 that drug traffickers generally use firearms to further their drug  
11 crimes, standing alone, is not sufficient to establish that a firearm  
12 was possessed in furtherance of a particular drug crime"). He is  
13 mistaken. The Court did not rely exclusively upon the officers'  
14 training and experience. To the contrary, the Court considered the  
15 record as a whole, including the location of the firearms in relation  
16 to evidence of drug-trafficking.

17  
18 *2. No basis for reconsidering exclusion of MUCA-related evidence*

19 One of the most fiercely disputed issues in this case has been,  
20 and remains, whether evidence of the defendants' alleged compliance  
21 with the MUCA is relevant for any purpose. In a series of orders  
22 issued earlier in this case, the Court rejected a number of the  
23 defendants' arguments and ruled MUCA-related evidence will not be  
24 admitted. As the Court explained in those orders, citing a long line  
25 of binding cases, the defendants' good-faith mistake of law is  
26 irrelevant, the medical benefits of marijuana are irrelevant, and the

1 defendants have not established a basis for asserting the defense of  
2 entrapment by estoppel. The defendants have not attempted to  
3 demonstrate any of the Court's specific rulings is contrary to the law  
4 of this circuit. Instead, they have asserted a variation on earlier  
5 arguments. They deny they intended to sell marijuana to persons  
6 outside their group. They insist they intended to consume all of the  
7 marijuana they manufactured. They argue evidence they were complying  
8 with the requirements of MUCA would tend to support their personal-use  
9 defense. In their opinion, the Court could fashion a limiting  
10 instruction that would allow them to present a personal-use defense to  
11 the jury without undermining the Court's prior rulings. The  
12 defendants' suggestion ignores questions the Court posed earlier in  
13 this case. MUCA-compliance could be relevant only if they actually  
14 were complying with MUCA's requirements. They say they were. The  
15 United States says they weren't. Who is to decide? Would the Court  
16 have to conduct a trial within a trial. The Court posed those  
17 questions earlier in this case. The defendants have not addressed  
18 them, much less suggested satisfactory answers.

19  
20 *3. Single agreement versus multiple agreements*

21 Ms. Gregg is entitled to challenge the United States' allegation  
22 of a single overarching conspiracy, and she is not without important  
23 evidence. For example, she may note the impossibility of growing  
24 marijuana out of doors year around in northeastern Washington. Based  
25 upon that circumstance, she is free to argue that persons who are  
26 collectively engaged in growing marijuana out of doors must enter into

1 a new agreement each year. Thus, even without MUCA-compliance  
2 evidence, Ms. Gregg has the ability to attack the United States'  
3 theory of the case.<sup>1</sup>

4 Ms. Gregg seeks to bolster her attack by offering evidence she  
5 was complying with MUCA. In her opinion, evidence of the annual-  
6 renewal requirement would tend to support her theory that there were,  
7 at most, two separate agreements to grow marijuana; one agreement in  
8 2011 and another one in 2012. Mrs. Gregg's argument is not without  
9 merit. MUCA-compliance evidence may have some relevance. However,  
10 not all relevant evidence is admissible at trial. Even when evidence  
11 is arguably relevant, it should be excluded if its probative value "is  
12 substantially outweighed by a danger of . . . unfair prejudice,  
13 confusing the issues, [or] misleading the jury . . . ." Fed.R.Evid.  
14 403. As explained in earlier orders, and earlier in this order, the  
15 probative value of MUCA-compliance evidence is speculative at best.  
16 By contrast, its potential to confuse and distract jurors is evident.  
17 Consequently, even assuming MUCA-compliance evidence has some  
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20 <sup>1</sup>The Court is not ruling Ms. Gregg is entitled to a multiple  
21 conspiracies instruction; that remains to be seen. *Cf. United*  
22 *States v. Fernandez*, 388 F.3d 1199, 1247 (9th Cir.2004) (evidence  
23 is sufficient to support a multiple conspiracies instruction  
24 where "'a jury could reasonably conclude that some of the  
25 defendants were only involved in separate conspiracies *unrelated*  
26 *to the overall conspiracy* charged in the indictment.'" (emphasis  
added in *Fernandez*) (quoting *United States v. Anguiano*, 873 F.2d  
1314, 1317 (9th Cir.1989))).



1 relevance, its probative value is substantially outweighed by the risk  
2 it will distort the jury's decision-making process. As a result,  
3 MUCA-compliance evidence will be excluded from Ms. Gregg's trial  
4 pursuant to Rule 403. While the defendants disagree with this ruling,  
5 they have failed to demonstrate it is erroneous. Reconsideration is  
6 unwarranted.

7 **IT IS HEREBY ORDERED:**

8 1. Michelle Gregg's motion to dismiss (**ECF No. 383**) is **denied**.

9 2. Michelle Gregg's motion for reconsideration (**ECF No. 384**) is  
10 **denied**.

11 3. The oral motions for reconsideration that were made on June  
12 23, 2014, are denied.

13 **IT IS SO ORDERED.** The District Court Executive is hereby  
14 directed to enter this order and furnish copies to counsel.

15 **DATED** this 24th day of June, 2014.

16  
17 s/ Fred Van Sickle  
18 Fred Van Sickle  
19 Senior United States District Judge  
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